IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel. W.A. DREW EDMONDSON, in his capacity as ATTORNEY GENERAL OF THE STATE OF OKLAHOMA AND OKLAHOMA SECRETARY OF THE ENVIRONMENT C. MILES TOLBERT, in his capacity as the TRUSTEE FOR NATURAL RESOURCES FOR THE STATE OF OKLAHOMA **PLAINTIFFS**

v. **CASE NO.: 05-CV-00329 GKF –SAJ**

TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC., COBB-VANTRESS, INC., CAL-MAINE FOODS, INC., CAL-MAINE FARMS, INC. CARGILL, INC., CARGILL TURKEY PRODUCTION, LLC, GEORGE'S, INC., GEORGE'S FARMS, INC., PETERSON FARMS, INC., SIMMONS FOODS, INC. and WILLOW BROOK FOODS, INC. **DEFENDANTS**

DEFENDANTS' REPLY ON MOTION TO AMEND SCHEDULE FOR HEARING ON PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION [DKT #1482]

In their *Motion to Amend Schedule for Hearing on Plaintiffs' Motion for a Preliminary Injunction* (Dkt #1482), Defendants provide a detailed description of two interrelated problems. First, Plaintiff has failed to abide by this Court's clear ruling that Plaintiff was required to produce all documents which its experts considered 21 days in advance of each expert's deposition. Second and perhaps more important, Plaintiff has insisted that its experts are not bound by the testimony and opinions they have submitted to the Court and the Defendants, but can rather develop new testimony right up to and during the preliminary injunction hearing. Accordingly, both Defendants and this Court are presented with a moving target. The depositions and affidavits given in support of the preliminary injunction provide no basis for

Defendants to prepare a response, as Plaintiff's experts are working on something new to unveil as a surprise at the hearing.

Both of these problems undermine the fairness of the Court's processes. Moreover, they are part of a longstanding pattern whereby Plaintiff has developed evidence in secret, withheld it in violation of this Court's discovery orders, and unveiled it only at the point of maximum tactical prejudice to the defense.

A. Plaintiff Has Developed The Preliminary Injunction For Years, Yet Refuses To Allow The Defendants Even A Few Weeks To Prepare A Response

Plaintiff denies that its counsel have sandbagged this process by withholding discovery that should have been produced long ago. Resp. at 12-13. And Plaintiff denies hiding the substance of its expert work until a time of tactical advantage. Rather, Plaintiff's Response asserts that Plaintiff's experts only recently conducted their work and realized that Plaintiff would need to seek a preliminary injunction because of the coming spring rains. *Id.* at 1, 4-5.

These assertions are contradicted by the testimony of Plaintiff's experts and by the statements of Plaintiff's counsel. First, Plaintiff's experts have admitted under oath that Plaintiff has been developing for years the evidence that Plaintiff is just now revealing. For example, in her recent deposition Dr. Valarie Harwood testified that her role in this case is to provide Plaintiff with assistance in analyzing bacteria and DNA to determine if she could identify the source of bacteria in the watershed. *See* Ex. 1 at 66:19 – 68:9. She first discussed that work with Plaintiff's counsel in summer 2004, *id.* at 29:1-7, and began substantive work in summer 2005. *Id.* at 24:1-10. By summer 2006 she had formed her opinion that poultry litter should be banned in the watershed. *Id.* at 307:5-17. During this entire time her testing and work on microbial DNA issues was ongoing. *Id.* at 307:18-25.

In January 2007, Judge Joyner ordered Plaintiff to produce its scientific evidence to Defendants by no later than February 1, 2007. *See* Ex. 2 at 8-11. But, as Plaintiff concedes in its Response to the instant motion, Plaintiff did not produce Dr. Harwood's materials or those of its other scientific experts until this Court ordered that production in December 2007 and January 2008, 21 days before each of the experts' depositions. *See* Resp. at 10-11.

Plaintiff touts its alleged compliance with this Court's mandate to produce each expert's scientific materials 21 days in advance of the expert's deposition, Resp. at 7-16. But Plaintiff's Response conveniently omits any mention of Judge Joyner's order of January 2007, which Plaintiff clearly violated by withholding all of these scientific materials until recently. Moreover, Plaintiff's claim that it complied with the 21-day order is incorrect. For example, in addition to the many violations of the 21-day rule discussed in Defendants' Motion, on February 1, Plaintiff produced two summaries of data on which Gordon Johnson relied. *See* Ex. 3. Plaintiff produced those documents after 5:00 on Friday, when Mr. Johnson's deposition was scheduled for the following Monday. *Id.* More importantly, Dr. Harwood testified that she received nearly all of her information in this case via email, and that she and Plaintiff's other experts frequently communicated about the data and science of the case via email. Ex. 1 at 27:5-19; 31:23 – 34:3; 34:21 – 35:5; 199:5 – 201:9; 229:1-19; 287:6 – 288:2. In fact, email was one of Plaintiff's experts principal means of collaboration. *Id.* Accordingly, Dr. Harwood testified that she preserved her emails and sent them to Plaintiff's lawyers for production. *Id.* at 31:23 – 34:3; 34:21 – 35:5. But Plaintiffs only produced a small handful of Dr. Harwood's emails to Defendants, without revealing that they were withholding the rest. *Id.* at 31:23 – 34:3. Plaintiffs similarly withheld the emails of its other experts. *See id.* at 27:5-19; 31:23 – 34:3; 199:5 – 201:9; 229:1-19; 287:6 – 288:2 (discussing substantive email discussions between Valarie

Harwood, David Page, Roger Olsen, Chris Teaf, Jennifer Weidhaas and Tanzem MacBeth); *id.* at 31:23 – 34:3; 34:21 – 35:5; 199:5 – 201:9 (Dr. Harwood confirming that the emails produced to Defendants are only a small subset of the emails she sent and received to Dr. Olsen and others). *See also* Ex. 4 at 117:12-23; 121:23 – 122:9; 232:15 – 235:15 (Gordon Johnson admits that he exchanged substantive emails with Bert Fischer, David Page and others, but that Plaintiffs did not produce any of his outgoing emails to Defendants). Although the transcript is not yet available, earlier today Plaintiff's expert Lowell Caneday testified that he gave all of his emails to Plaintiff's counsel, although those emails have not been produced to Defendants.

The depositions of Plaintiff's experts are now over, the hearing begins in two weeks, and Plaintiff has denied Defendants the opportunity to review its experts' emails. Plaintiff's experts repeatedly admitted that email was a main conduit for their substantive discussions. This Court knows the value of email in discovery, yet that discovery has been withheld in violation of this Court's express order. This is not a situation of minor oversight or copying mistakes that are common to discovery. In fact, when it was revealed in the depositions that Plaintiff had withheld its expert email, Defendants requested that it be produced immediately. *See, e.g.*, Ex. 4 at 232:15 – 235:15. Defendants have written to Plaintiff's counsel multiple times in the last few weeks requesting production of the late email. *See* Ex. 5. But Plaintiff continues to withhold these documents.

Similarly, On January 31, Plaintiff produced a lengthy series of complex charts considered by Bert Fischer. *See* Ex. 6. Fischer's deposition had already occurred a week earlier, on January 23. Roger Olsen's deposition, originally scheduled for January 25, had to be postponed until February 2 because on January 23 (2 days before Olsen's deposition) Plaintiff produced an entire CD of "additional materials" considered by Olsen. *See* Ex. 7. Defendants

had deliberately scheduled Olsen's deposition to occur before the Harwood deposition because Harwood relied on Olsen for much of her work. *See* Ex. 4 at 21:13-20; 29:1-6; 37:13 – 38:3. Plaintiff's delay in producing a huge volume of Olsen documents frustrated this intent, and Defendants were required to take the Harwood deposition without the essential knowledge we would have gained from Olsen.

B. Contrary To Plaintiff's Argument, This Court Has Ample Authority To Set And Enforce Discovery Deadlines

Plaintiff's Response argues that Defendants are incorrect in asserting that the late-produced and withheld materials were required to be produced under the Rules. Resp. at 17. Regardless of this dispute, Judge Joyner ordered these documents produced no later than February 1, 2007. *See* Ex. 2 at 8-11. Additionally, this Court ordered that the documents considered by each expert be produced 21 days in advance of the respective expert's deposition. It is well settled that a district court has "broad discretion regarding its control of discovery." *Rohlman v. Vetter Health Services, Inc.*, Slip Copy, 2007 WL 4590259 at *1 (D.Kan. Dec. 26, 2007) (quoting *Gaines v. Ski Apache*, 8 F.3d 726, 730 (10th Cir. 1993)); *see also King v. PA Consulting Group, Inc.*, 485 F.3d 577, ___ (10th Cir. 2007) ("District courts are properly granted broad discretion over discovery and scheduling matters; otherwise, they would be unable to effectively manage their caseloads."). This discretion to control the content and deadlines for discovery extends to both the orders of Judge Joyner as well as to those of the Court. *Hinsdale v. City of Liberal*, 981 F.Supp. 1378, 1379 (D.Kan. 1997). Accordingly, Plaintiff has no legal basis for its continual disregard of the Court's discovery deadlines.

Plaintiff's Response asserts that the Court lacks its normal power to set discovery deadlines in the context of a preliminary injunction. Resp. at 6 (citing *Midwest Guaranty Bank v. Guaranty Bank*, 270 F.Supp. 2d 900, 917-18 (E.D. Mich. 2003)). This argument is incorrect.

Judges routinely set discovery deadlines in the context of preliminary injunction hearing. *See Autotech Technologies Ltd. Partnership v. Automationdirect.Com, Inc.*, 236 F.R.D. 396, 397 (N.D.Ill. 2006); *Township of West Orange v. Whitman*, 8 F.Supp.2d 408, 411 (D.N.J. 1998) (noting that the magistrate judge established a schedule for discovery related to preliminary injunction hearing).

Plaintiff's continued violations of the Court's orders have significantly prejudiced the Defendants. Plaintiff argues that each omission was only a few documents here and a few documents there. But Plaintiff underplays the number of documents it has withheld or produced late. Moreover, these late-produced databases, charts and graphs contain detailed information that must be broken down and digested to be used. And no responsible lawyer would voluntarily proceed to depose a witness on complex matters without access to the witness' email, especially when the email is the witness' principal source of communication and collaboration.

The Court's deadlines are important. Imposing an appropriate sanction for Plaintiff's repeated failures to comply would be appropriate to attempt to remedy the prejudice Plaintiff has created. "Ignoring deadlines is the surest way to lose a case. Time limits coordinate and expedite a complex process; they pervade the legal system, starting with the statute of limitations. Extended disregard of time limits (even the non-jurisdictional kind) is ruinous. 'Lawyers and litigants who decide that they will play by rules of their own invention will find that the game cannot be won.'" *U.S. v. Golden Elevator, Inc.*, 27 F.3d 301, 302 (7th Cir. 1994) (quoting *Northwestern National Insurance Co. v. Baltes*, 15 F.3d 660, 663 (7th Cir. 1994)).

C. Plaintiff's Efforts To Present A Moving Target Violate This Court's Orders And Fundamental Fairness

Finally, Plaintiff's Response concedes that Plaintiff's experts continue to do work that they intend to present at the hearing. Resp. at 4-5. This makes a mockery of the depositions and

document discovery ordered by the Court. There is no point in conducting depositions to understand an expert's work and the bases for the expert's opinion if the work and supporting bases will be different when the expert takes the stand. Moreover, the Court would not have ordered Plaintiffs to produce documents sufficiently in advance of the depositions if the experts were permitted to simply view or create new documents immediately before or after their deposition. At some point a party's allegations must be fixed (even if temporarily) so as to allow those allegations to be tested in a meaningful and orderly manner. The federal courts have repeatedly warned against "trial by ambush." As the Sixth Circuit stated in *Val-Land Farms v. Third National Bank*, 937 F.2d 1110, 1113 (6th Cir. 1991), parties "are not free to present a moving target, thereby making the courts (both us and the district court) as well as their opponent guess at the nature of the claim presented to the court."

Plaintiff argues that its experts should be able to change their work so long as the experts still come to the same ultimate conclusion. This misunderstands the nature of the Court's work. The Court does not need to know simply that the experts have come to the ultimate conclusion that Plaintiff wanted. The Court needs to know *why* they came to that conclusion, including all of the messy details about the experts' work. It is Defendants' job to uncover the omissions, errors and failings of Plaintiff's experts and demonstrate them to the Court. This cannot be done if the experts change the bases for their opinions between their depositions and the hearing.

* * *

Plaintiff has repeatedly violated this Court's orders. Plaintiff continues to withhold the email of its experts as of the moment of this document's filing and even refuses to identify what it has withheld. Plaintiff's experts continue to change their work so as to prevent Defendants from unmasking its flaws. These unfair actions require some relief. If the hearing proceeds as

scheduled, the Court should, at a minimum: (1) exclude late-produced documents from the hearing; and (2) exclude expert testimony based on materials that were not disclosed or based on work performed after the expert's deposition. If that late-performed work is relevant to the issues, it may be used at trial on the merits. This ruling could be enforced by appropriate objection at the hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 5th day of February 2008, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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